SUPREME COURT, U. S.

No. 1271

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

SUNDACO, INC., ET AL., *Appellants,*

v.

THE STATE OF TEXAS, ET AL., *Appellees.*

On Appeal From the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

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JURISDICTIONAL STATEMENT

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March 1970

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JURISDICTIONAL STATEMENT

Appellants Sundaco, Inc., M.N. Landau Stores, Inc., and Joseph Piper appeal from a judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, which sustained against federal constitutional challenge the validity of a state statute under ~~which~~ state and local authorities seek to prohibit the appellants and their employees from engaging in business activities on consecutive Saturdays and Sundays.

OPINION BELOW

The trial court, the 42d District Judicial District Court of Taylor County, Texas, did not write an opinion. The opinion of the Court of Civil Appeals of Texas is reported at 445 S.W.2d 606 and is printed in Appendix A to this Statement (pp. 1a-6a, *infra*).

JURISDICTION

This is a proceeding in which the appellants defended against a suit to enjoin conduct of their businesses on consecutive Saturdays and Sundays on the ground that the statute pursuant to which state and local authorities were proceeding against them was invalid under, among other things, provisions of the United States Constitution. The trial court granted summary judgment to appellants on the ground that the statute "is vague, and indefinite, and therefore unconstitutional." (Tr. 130).[1] The Court of Civil Appeals of Texas, in a judgment (p. 7a, *infra*) disposing finally of appellants' federal constitutional claims, reversed the trial court and upheld the validity of the statute. The Court of Civil Appeals' judgment was entered on August 29, 1969. A timely filed motion for re-

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[1] "Tr." citations are to the transcript of record in the 42d District Court of Taylor County, the trial court, which was the record in the Court of Civil Appeals. When the term "appellants" is used, the reference is to the corporate appellants Sundaco, Inc., and M. N. Landau Stores, Inc. Joseph Piper, an employe, is also an appellant; his plea in abatement was granted by the trial court, and the judgment as to him may have been included in the notice of appeal to the Court of Civil Appeals. (Tr. 90, 134-36). The Court of Civil Appeals did not deal specifically with his case. He is an appellant here to be certain that any judgment of reversal entered by this Court would inure to his benefit in case the appellees do not consider his case closed by the trial court's original order granting his plea in abatement.

hearing was denied on September 26, 1969. The Supreme Court of Texas denied a timely-filed application for a writ of error on November 5, 1969, and a motion for rehearing of its denial on December 3, 1969. A notice of appeal to this Court was filed in the Court of Civil Appeals on February 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Cases that sustain the jurisdiction of this Court include *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-95 (1962); *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U.S. 266 (1936); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

STATUTES INVOLVED

Article 286a of the Texas Penal Code, Vernon's Ann. P.C. art. 286a, is set out below. Articles 283, 284, 285, 286 and 287 of the Texas Penal Code are set out in Appendix A to the Jurisdictional Statement in *Spartan's Industries, Inc.* v. *Texas*, No. 1255 of this Term.

VERNON'S ANNOTATED PENAL CODE OF TEXAS

Art. 286a. Sale of goods on both the two consecutive days of Saturday and Sunday

Prohibition of sales; items; misdemeanor

Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines;

driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys; excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales

Sec. 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalties

Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars ($100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding six (6) months or by a fine of not more than Five Hundred Dollars ($500.00); or both.

Purpose; public nuisances; injunction; application and proceedings

Sec. 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership or

corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Occasional sales

Sec. 5. Occasional sales of any item named herein by a person not engaged in the business of selling such item shall be exempt from this Act.

Legislative intent

Sec. 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act.

QUESTIONS PRESENTED

1. Whether a state statute that lists categories of articles and goods and prohibits their sale on both of the two consecutive days of Saturday and Sunday deprives merchants to whom it applies of liberty or property without due process of law in violation of the Fourteenth Amendment because it bears no rational relationship to the legitimate legislative purpose of so-called Sunday closing laws, *i.e.*, to provide for a common day of rest and tranquillity.

2. Whether such a statute denies to merchants to whom it applies the equal protection of the laws be-

cause it subjects their businesses to rules and sanctions different from those applicable to other businesses and there is no rational basis for the classification in view of the purpose and effect of the statute establishing it.

3. Whether a criminal statute that lists, without definition, nearly 50 categories of articles and goods, a number of them not self-defining, and forbids their sale on the two consecutive days of Saturday and Sunday deprives merchants to whom it applies of liberty or property without due process of law in violation of the Fourteenth Amendment because it is so vague as not to give them fair warning of what conduct on their part is proscribed.

STATEMENT

The facts concerning Article 286a of the Penal Code of Texas, its purpose, its sanctions and its relationship to Texas' Sunday closing laws are set out in the Jurisdictional Statement in *Spartan's Industries, Inc.* v. *Texas,* No. 1255 of this Term.

In this case a district attorney and the City Attorney of Abilene sued to enjoin appellants from selling merchandise in violation of Article 286a. Appellant M. N. Landau Stores, Inc., operates Clark's Discount Store in Abilene. Appellant Sundaco, Inc., is an unrelated corporation that has an agreement with Landau to engage in retail operations from the Clark's location on Sunday. In their injunction suit the state and local authorities took the position that by this arrangement the two corporations were violating Article 286a. The appellants defended on the ground that Article 286a applies only to Saturday and Sunday sales by the same person and Landau and Sun-

daco are bona fide separate corporations and on the further ground, among others, that Article 286a is unconstitutional as in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution. On the basis of stipulations and admissions of certain facts both sides moved for summary judgment. The trial court held that Article 286a "is vague, and indefinite, and therefore unconstitutional," and on that basis granted appellants' motion for summary judgment. (Tr. 130).

On appeal the Court of Civil Appeals reversed the trial court. It upheld the constitutionality of the statute generally and specifically held that it was not void for vagueness. The appellants renewed their constitutional claims in an application to the Texas Supreme Court for a writ of error. (See Document No. I). That court denied the application. It also denied a motion for rehearing on the same day that it handed down its decision in *State* v. *Spartan's Industries, Inc.*, No. B-1255, (in this Court as No. 1255 of this Term), which finally concluded all of the federal constitutional claims asserted by appellants here, though certain state questions remain open on remand. Compare *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The substantiality of the questions presented is demonstrated in the discussion under that heading in the Jurisdictional Statement in *Spartan's Industries, Inc.* v. *Texas*, No. 1255 of this Term. The Court's attention is respectfully invited to that discussion, on which appellants here rely.

CONCLUSION

Probable jurisdiction should be noted and the case set down for plenary hearing on the merits.

Respectfully submitted,

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March 1970

APPENDIX

Opinion of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

No. 4281

THE STATE OF TEXAS ET AL, *Appellants*

v.

SUNDACO, INC., ET AL, *Appellees*

Appeal from the 42nd Judicial District Court of Taylor County.

The State of Texas and the City of Abilene brought this suit against Sundaco, Inc., M. N. Landau Stores, Inc., d/b/a/ Clarks and Joseph Piper to enjoin the defendants from selling and offering for sale certain merchandise on consecutive days of Saturday and Sunday in violation of Article 286a. Both plaintiffs and defendants filed motions for summary judgment. The District Court found that there was no genuine issue of any material fact in the case and further found that Article 286a V.A.T.P.C. was so vague and indefinite that it was unconstitutional, and granted defendants' motion for summary judgment. The State of Texas and the City of Abilene have appealed.

The applicable portions of the statute in question are as follows:

> "Art. 286a. Sale of goods on both the two consecutive days of Saturday and Sunday.
>
> Probibition of sales; items; misdemeanor
>
> Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, ex-

cluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales

Sec. 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalties

Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars ($100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding six (6) months or by a fine of not more than Five Hundred Dollars ($500.00), or both.

Purpose; public nuisances; injunction; application and proceedings

Sec. 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership or corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Emergency purchases; certification

Sec. 4a. Repealed. Acts 1967, 60th Leg., p. 79, ch. 39, § 1, eff. Aug. 28, 1967.

Occasional sales

Sec. 5. Occasional sales of any item named herein by a person not engaged in the business of selling such items shall be exempt from this Act.

Legislative intent

Sec. 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act. Acts. 1961, 57th Leg., 1st C.S., p. 38, ch. 15, eff. Nov. 7, 1961."

Article 286, V.A.T.P.C. is a general penal statute prohibiting and penalizing the selling of goods on Sunday. Article 287, V.A.T.P.C. exempts certain types of transactions, markets and dealers from a compliance with Article 286, supra, and permits the sale of certain articles on Sunday.

Legislative acts are entitled to great respect and it is the duty of the courts to uphold them, if possible. 16 C.J.S., p. 357. It is a well settled principle of law that a State statute is presumed to be constitutional and will not be held otherwise unless it clearly and undoubtedly contravenes some constitutional provision. 12 Tex. Jur. 2d, pgs. 385, 386, 429.

It is also well settled that a Legislative act, particularly a criminal or penal statute, should be reasonably clear and plain, and where the language of such an act is essentially so indefinite, uncertain and vague that it cannot be understood it is inoperative, unenforceable and void. 53 Tex. Jur. 2d, pgs. 41-43, V.A.P.C. Art. 6. A statute which forbids or requires performance of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates "due process of law." Lone Star Gas Company

v. Kelly, 165 SW 2d 446 (Comm. Apps.); Connally v. General Construction Company, 269 U.S. 385, 46 (Sup. Ct.), 126, 127, 70 L. ed. 322; Ex parte Chernosky, 217 SW 2d 673 (Ct. Criminal App., 1949).

In appellants' first point it is urged that the court erred in holding that Article 286a, V.A.T.P.C. is unconstitutional by reason of being vague and indefinite and in granting appellees' motion for summary judgment.

The essence of appellees' contention in support of the judgment, holding that the statute in question is so vague and indefinite as to be void, is that there are no standards, guide lines or criteria therein by which an individual of ordinary intelligence can determine without doubt or indecision what conduct is allowed and what is prohibited. Appellees assert that the statute does not prohibit all sales on consecutive Saturdays and Sundays; that under the statute it is legal to make sales on consecutive Saturdays and Sundays, but that the sale of some specified items are prohibited on such consecutive days. Appellees however contend that the unconstitutional-vagueness and indefiniteness of the statute exists in that it cannot be determined, without doubt and indecision, just what the restricted items are. We cannot agree with appellees' contention.

Somewhat similar statutes in other states with respect to the kind of merchandise that cannot be sold on Sunday have been held not unconstitutional because of vagueness. See McGowan v. Maryland, 366 U.S. 420, 81 S. Ct. 1101, 6 L. ed. 2d 393; Charles Stores Company v. Tucker, 263 N.C. 710, 140 S.E. 2d 370 (1965); State v. Solomon, 245 S. C. 550, 141 S.E. 2d 818 (1965); State v. McQueen, 378 S.W. 2d 449 (Missouri Supreme Court, 1964). In the McQueen case the Missouri Sunday closing act was challenged on the ground of vagueness and the specific complaint was that the terms used in the act to describe articles of merchandise, the sale of which was prohibited

on Sunday, as well as the categories of merchandise excluded from the prohibition, violated the due process requirement of certainty. It was held by the Supreme Court of Missouri that the statute there involved, which is very similar to our Article 286a, does not violate due process provisions of the constitution.

In the recent case of Hill v. Gibson Discount Center, 437 SW 2d 289 (1968), it was held by the Amarillo Court of Civil Appeals that the provisions of Article 286a prohibiting the sale of the items of merchandise enumerated therein on consecutive Saturdays and Sundays was not unconstitutionally vague and indefinite. We agree with the reasoning and the holding of that case. In our opinion the statute is not unconstitutional, by reason of being vague and indefinite as contended by appellees. We sustain appellants' point urging that the trial court erred in so holding and in granting appellees' motion for summary judgment. Fass v. Roos, 221 Fed. Supp. 448 (1963); State v. Wiener (La. Sup. Ct., 1964), 161 So. 2d 755 and Commonwealth v. Levy, 178 A. 2d 858, (Penn. 1962).

Appellants State of Texas and City of Abilene contend in their third point that the court erred in refusing to grant their motion for summary judgment. The motion was filed April 19, 1968, and the time specified for hearing was May 2nd, 1968. No ruling was made on appellants' motion for summary judgment and there is no showing that the motion was ever presented to the trial court for determination. Since the record does not show that appellant's motion was presented to and passed upon by the court, no reversible error is presented for our consideration. Ellis Drilling Corporation v. McGuire, 321 SW 2d 911 (Ct. Civ. Apps., 1959, n.r.e.)

Appellants rely upon Tobin v. Garcia, 316 SW 2d 396, (Tex. Sup. Ct. 1958) as authority for their contention that since both parties filed motions for summary judgment and the motion of appellees was sustained that this

court may determine not only whether the granting of appellees' motion was correct, but also whether the trial court should have granted their motion. Appellants overlook the fact that in Tobin v. Garcia where both parties filed motions for summary judgment, the trial court granted one motion and overruled the other. After Tobin v. Garcia our Supreme Court in Ackermann v. Vordenbaum, 403 SW 2d 362, (Tex. Sup. Ct., 1966), discussed and explained their holding in Tobin v. Garcia as follows:

> "In the Tobin-Garcia case, the appeal was from an order granting a summary judgment based upon the defendants' motion. We held that the order granting such summary judgment was erroneous and that after having made such holding, we were authorized to review the trial court's action in overruling the plaintiff's motion for summary judgment. In the present case, an order of dismissal was appealed from instead of an order granting a motion for summary judgment."

Also in Gulf, Colorado & Santa Fe Ry. Co. v. McBride, 322 SW 2d 492 (Tex. Sup. Ct., 1959), it was stated by our Supreme Court as follows:

> "We held (in Tobin v. Garcia) that where there was a final judgment rendered in a cause, which was appealable (and was appealed), the appellate court could act upon a denied motion for summary judgment, if the point has been properly preserved."

Since the alleged error of the trial court in not granting appellants' motion for summary judgment was not properly preserved this court is without jurisdiction to pass upon the point.

For the reasons stated, the judgment is reversed and the cause is remanded.

CECIL C. COLLINGS
ASSOCIATE JUSTICE

August 29, 1969.

Judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

From the 42nd District Court of Taylor County.

No. 4281

THE STATE OF TEXAS ET AL,

v.

SUNDACO, INC. ET AL,

August 29, 1969

Opinion by Collings, A. J.

This cause came on to be heard on the transcript of the record and the same being inspected, it is the opinion of the Court that there was error in the judgment. It is therefore ordered, adjudged and decreed that the judgment ment of the trial court be, and the same is hereby, reversed and the cause remanded, in accordance with the opinion of this Court. It is further ordered that the costs incurred by reason of this appeal be, and the same are hereby, taxed against appellees, Sundaco, Inc., and M. N. Landau Stores, Inc., for which let execution issue, and that this decision be certified below for observance.

SUPREME COURT, U. S.

NO. 1271

IN THE

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October Term, 1969

SUNDACO, INC., ET AL.,

Appellants

v.

THE STATE OF TEXAS,

Appellee

On Appeal From The Court of Civil Appeals
For The
Eleventh Supreme Judicial District of Texas

MOTION TO DISMISS OR AFFIRM

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NO. 1271

IN THE

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October Term, 1969

SUNDACO, INC., ET AL.,

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v.

THE STATE OF TEXAS,

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On Appeal From The Court of Civil Appeals
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MOTION TO DISMISS OR AFFIRM

Appellee, The State of Texas, respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Civil Appeals on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

I.

STATEMENT

The constitutional questions presented in Appellants' Jurisdictional Statement herein are identical to those which are fully discussed in Appellee's Motion

to Dismiss or Affirm in *Spartan's Industries, Inc. v. Texas*, No. 1255, of this Term, which also present no substantial federal question for review by this Court.

II.

THE NATURE OF THE CASE

A.

The State Statute Involved

This appeal raises the question of the constitutionality of Article 286a, Texas Penal Code, 1925, as amended, Acts 1961, 57th Leg., 1st Called Session, Ch. 15, p. 38) which prohibits the sale of 46 specified commodities on both the consecutive days of Saturday and Sunday, upon penalty of a fine up to $100, for the first offense, and a fine up to $500 for second and subsequent offenses, or imprisonment in jail up to 6 months, or both, and which provides that violations may be restrained by injunction.

B.

The Questions Presented

The Appellants, contend that this statute bears no reasonable relation to the public welfare; that they are denied equal protection because the statute raises the penalty and threatens an injunction only against those who are in the business of selling the particularly enumerated articles; and that these commodities are set forth in terms so vague and indefinite as to render the statute constitutionally infirm.

C.

The Proceedings Below

Appellee brought this suit to enjoin the Appellants from selling certain items of merchandise on both the two consecutive days of Saturday and Sunday in violation of Article 286a. Among other defenses, the Appellants attacked the constitutionality of this statute. The trial court, granted summary judgment for the Appellants on the ground that Article 286a was unconstitutionally vague and indefinite. Appeal was taken to the Court of Civil Appeals which reversed the trial court and upheld the constitutionality of the statute. It specifically held that the statute was not void for vagueness and remanded the cause to the trial court. Appellants then filed their application for writ of error to the Supreme Court of Texas which was refused with the notation "no reversible error."

III.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

This Court, on May 29, 1961, carefully considered and comprehensively analyzed and decided the constitutionality of various state Sunday laws in *McGowan v. Maryland*, 366 U.S. 420, *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617, *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582; and *Braunfeld v. Brown*, 366 U.S. 599.

Following the legal principles applicable to determining the constitutionality of Sunday laws as estab-

lished, or reaffirmed, in those cases, the Texas Legislature (on August 11, 1961) enacted Article 286a.

Article 286a was superimposed upon existing Article 286, Texas Penal Code, which is a general Sunday closing law, prohibiting sales, or business openings, punishable by a fine from $20 to $50 (subject to exceptions for drug stores, hotels, restaurants, sales of motor fuels, etc., as specified in Article 287) and which does not provide for injunctive relief, (similar to the situation presented to this Court in *Two Guys from Harrison, supra*).

In the above-cited cases it has been well established by this Court that a one-day surcease from commerce serves the general welfare of the public and is a proper exercise of the states' police power. It is further settled by these cases that it was within the power of the state to have concluded that businesses who were selling the enumerated items were particularly disrupting and that their violation of the law was of a different dimension, requiring a different remedy to facilitate enforcement.

Purpose of the Statute

The purpose of the statute is to promote the health, recreation and welfare of the people of the State of Texas (Article 286a, Section 1) by preventing the sale of certain articles seven (7) consecutive days.

Section 6 of the Session Laws is omitted from the codification of Article 286a, however, this section (the emergency clause) further clarifies the purpose of the statute and reads, in part, as follows:

> "Sec. 6. The fact that there are not now adequate laws to prevent the selling of certain articles seven (7) consecutive days and the further fact that legislation is needed to prevent and punish such offense. . . ."

(Acts 1961, 57th Texas Leg., 1st Called Session, Ch. 15, p. 38).

Although a one-day surcease from labor has never been unanimous (because exceptions are always allowed), the Sunday closing laws have been vigorously attacked by those who take a day of rest on some day of the week other than Sunday (as in the cases cited above).

As stated by this Court in *McGowan v. Maryland*:

> "If is true that if the State's interest were simply to provide for its citizens a periodic respite from work, a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual would suffice." (366 U.S. 450).

Article 286a serves this public purpose by providing a one-day surcease from labor (to occur on the weekend) and still alleviates the objections of the Sabbatarians by permitting sales of the specified commodities on either Saturday or Sunday (but not on both days) at the option of the merchant.

Equal Protection — Classification

Appellants contend they are denied equal protection of the laws because they are subjected to higher fines and injunctions only because they are in the business of selling the 46 enumerated commodities.

In answer to the same argument presented in *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 591, 592 (1961), this Court held that it was within the power of the state legislature to have concluded that these businesses (who were selling the enumerated items) were particularly disrupting and that their violation of the law was of a different dimension, requiring a different remedy, citing *Williamson v. Lee Optical*, 348 U.S. 483, 489, as follows:

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . a remedy there, neglecting the other."

This Court also stated in *McGowan v. Maryland*, 366 U.S. 425, 426 (1961):

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some equality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The Texas statute operates in the same manner as those of Maryland and Pennsylvania, in these regards, and does not, therefore, present a substantial question for review by this Court.

Vagueness

Appellants also contend that the prohibited commodities are set forth in terms so vague and indefinite as to render that statute unconstitutional.

The commodities enumerated in Article 286a are strikingly similar to those presented to this Court in *Two Guys From Harrison-Allentown, Inc. v. McGinley, supra*, and also reviewed by this Court in *Arlan's Department Store of Louisville, Inc. v. Kentucky*, 369 S.W.2d 9 (Ky.Appls., 1963); dismissed for want of a substantial federal question, 376 U.S. 186 (1964).

A South Carolina statute (Sec. 64-2.2, Code 1962) contains a list of commodities almost identical with those set forth in the Texas statute. The Supreme Court of South Carolina, in *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965), held that statute not to be unconstitutionally vague. The appeal to this Court was dismissed for want of a substantial federal question. *Solomon v. South Carolina*, 382 U.S. 204 (1965).

A similar question of vagueness was rejected in *Whitney Stores, Inc. v. Summerford*, 280 F.Supp. 406 (1968). That judgment was affirmed by this Court, 393 U.S. 9 (1968).

In *State v. Spartan's Industries, Inc.*, 447 S.W.2d 407, 413 (1969), the Supreme Court of Texas found that:

> "[V]irtually all of these terms are common words, which will be understood by any merchant. If a marginal or questionable case could be posed for the application of the word 'hardware,' for example, this would be no ground for vitiating an entire legislative enactment. United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947); Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951)."

Since no facts or evidence were presented in this case, the statute is not constitutionally infirm on its face, and there is no substantial question of vagueness presented to this Court for review.

IV.

CONCLUSION AND PRAYER

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsub-

stantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Civil Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of Appellee's Motion to Dismiss or Affirm were served on the attorneys for the Appellants by depositing same in the United States Mail, postage prepaid, certified mail, on this the _____ day of _____, 1970, addressed as follows: William H. Allen, Esquire, 888 Sixteenth Street, N.W., Washington, D. C. 20006, and Messrs. Harold B. Berman and Jay S. Fichtner, 1510 LTV Tower, 1525 Elm Street, Dallas, Texas 75201

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